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Supreme Court of the United States

1973 TERM

[redacted]

NO. _____

EZRA CHARLES BRANTLEY

Petitioner

VS.

THE CITY OF DALLAS

Respondent

PETITION FOR A WRIT OF CERTIORARI
ON APPEAL FROM THE SUPREME COURT OF TEXAS

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PETITION FOR A WRIT OF CERTIORARI

ON APPEAL FROM THE SUPREME COURT OF TEXAS

The Petitioner, EZRA CHARLES BRANTLEY, prays that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of the State of Texas rendered in this proceeding on December 19, 1973, as a final judgment of the highest Court in this Honorable State, overruling Appellant's Motion for Rehearing on Application for Writ of Error.

OPINIONS BELOW

Petitioner's Trial Court pleadings showed:

(1) On December 3, 1971, in the course of his employment for the City, Plaintiff snagged a rotten boot heel, stumbled and fell on his back.

(2) Was placed in the hospital by the City on December 13, 1971;

(3) Petitioner was discharged from the hospital by the City on January 6, 1972, or three days after the expiration of thirty days from the date of injury;

(4) Following his hospital discharge Petitioner was forced to be bed ridden and shortly thereafter obtained counsel who filed the Notice to the City on February 16, 1972.

In the Trial Court the City filed a Motion for Summary Judgment (Tr 18) demanding that Petitioner's case be dismissed because he did not comply with the thirty day Charter Notice Provision of giving the City a letter setting out certain required elements of his injury. The Petitioner then filed pleadings (Tr 28, 29, 52 & 56) and briefs (Tr 72-77) setting out that the Charter Notice Provision constituted a violation of: (1) Due Process of Law of the Fourteenth Amendment of the United States Constitution; (2) Equal Protection of the same Fourteenth Amendment of the United States Constitution; (3) and the Right to a Fair Trial by Jury at the Seventh Amendment of the United States Constitution. The Trial Court entered an Order granting the Motion for Summary Judgment and overruling Petitioner's of violated Constitutional Guarantees. (Tr 83). j

Petitioner filed an appeal from the Trial Court to the Court of Civil Appeals setting out the violation of these three Constitutional Guarantees (Appendix A). The Appeals Court sustained the Trial Court (Appendix B). Petitioner then filed a Motion for Rehearing (Appendix C) which was overruled (Appendix D). The Petitioner then filed an Application for Writ of Error (Appendix E) in the Supreme Court of Texas alleging again the violation of Petitioner's three said U.S. Constitutional guarantees. The Texas Supreme Court refused a hearing on Petitioner's Writ (Appendix F). Petitioner then filed a MOTION FOR REHEARING (Appendix G). On December 19, 1973, the Texas Supreme Court overruled Petitioner's Motion for Rehearing (Appendix H).

JURISDICTIONAL STATEMENT

How the Federal Question was Raised and Passed Upon

The Petitioner raised the following Federal Questions which he asks this Court to review:

1. In the Trial Court Petitioner filed an Original Petition, an Amended Petition, an Answer to the Motion for Summary Judgment, and an Amended Answer to said Motion. These pleadings set out that the Charter Provision restricting Petitioner's right to litigate his case in the Trial Court violated U.S. Constitutional Guarantees of the Fourteenth Amendment, Due Process and Equal Protection, and of the Seventh Amendment, Right to a Trial by Jury.

2. Petitioner relied solely upon these violations of U.S. Constitutional guarantees for his Appeal and Brief of Appellant filed in the Civil Appeals Court. The Civil Appeals Court over-

ruled the Petitioner's Appeal. Petitioner pled no other reasons for appeal other than violation of his U.S. Constitutional Guarantees by the arbitrary Charter Provision which stated that Petitioner could not file his lawsuit unless he had given the City a letter containing certain elements relating to his injury within thirty (30) days from date thereof.

3. The Petitioner appealed to the Supreme Court of Texas. In his Application for Writ of Error, the Petitioner pled that the Appeals Court's holding that, "The rule is well established in Texas that Charter Provisions requiring written Notice of an Injury within a fixed time are valid and compliance is a condition precedent to the maintenance of an action against the City," was opposed to the holding of Reich vs. State Highway Dept., 170 N.W. 2d 267 (Mich. Sup. 1969) and Friedman v. Farmington Township School District, 194 N.W. 2d 785 (Mich. App. 1972) that such thirty (30) day Notice became arbitrary since the historical purpose of providing the City with an opportunity to investigate plaintiff's claim had been met and same violated, "Equal Protection of the Law of the Fourteenth Amendment . . ., Due Process of Law of the Fourteenth Amendment . . . , and a right to a . . . trial by Jury of the Seventh Amendment."

4. That the granting of the Motion for Summary Judgment by the Trial Court upholding the arbitrary thirty (30) day written Notice of personal injury claim provision as set out by the City of Dallas's Charter after reasonable opportunity had been provided for the City to investigate said claim and the historical purpose thereof satisfied, violated the following Constitutional Guarantees:

(a) Equal Protection of the Law of the Fourteenth Amendment;

(b) Due process of law of the Fourteenth Amendment;

(c) The right to a fair trial or in the alternative to a Trial by Jury of the Seventh Amendment.

Petitioner pled only violations of the three above U.S. Constitutional guarantees in all three courts, i.e. Trial Court, Appeals Court, Texas Supreme Court. The Texas Supreme Court refused Petitioner's Writ on November 28, 1973, setting out, "No Reversible Error." Petitioner's Motion for Rehearing was subsequently overruled in a final judgment from the State's highest Court on December 19, 1973.

In refusing to hear the Petitioner's Application for Writ of Error and in overruling Petitioner's Motion for Rehearing, the Texas Supreme Court applied and enforced to the Petitioner's disadvantage a City Charter Provision which required the filing of written Notice containing certain elements within thirty (30) days, from date of injury and such enforcement of the said provision was repugnant to the Fourteenth Amendment and the Seventh Amendment of the Constitution of the United States of America. This Order overruled Petitioner's Motion for Rehearing on December 19, 1973. This ruling constituted the final judgment of the highest State Court. Petitioner filed his Petition for Certiorari to the U.S. Supreme Court in less than 90 days from December 19, 1973. The jurisdiction of this Court is invoked under 28 U.S. C. § 1257 (3).

QUESTIONS PRESENTED BY THE APPEAL

(1) Does a City Charter Provision that denies the right to trial by jury for a personal injury claim because of the failure of

the injured claimant to deliver written Notice within thirty (30) days to the City after reasonable opportunity has been provided for the City to investigate said claim, violate the Seventh and the Fourteenth Amendments to the United States Constitution?

(2) Does a state statute and notice provision that divides tortfeasors into two classes, public and private, thereby depriving a person injured by a governmental tortfeasor of the same limitations rights as a person injured by a private tortfeasor, in which to bring a cause of action, violate the Seventh and the Fourteenth Amendments to the United States Constitution?

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment VII
Guarantee of a jury trial "in suits at common law where value in controversy shall exceed twenty dollars."

Constitution of the United States, Amendment XIV, Sec. 1
"nor shall any State deprive any person of life, liberty or property without due process of law."

Constitution of the United States, Amendment XIV, Sec. 1
"nor shall any State deprive any person of life, liberty or property without . . . equal protection of law."

STATEMENT OF FACTS

This petition summarizes uncontroverted facts.

Ezra Charles Brantley is a forty three (43) year old unskilled negro, having a fifth grade education. In his employment for the

City of Dallas, he fell and hurt his back while finishing cement. Both Brantley and his eye witness supervisor signed statements that the accident occurred on December 3, 1971 (Tr 45 & 67). Brantley's back stiffened and, "was hurting me real bad." (Tr 45). Brantley's foreman sent him to a City official, who referred him to a City general practitioner. The doctor supplied him with pain pills and muscle relaxants. After a week or so of this unsuccessful treatment the general practitioner requested the City to call in an orthopedic specialist. The City selected orthopedic examined Brantley. The City orthopedic then requested the City to admit Mr. Brantley into the hospital. The City authorized Brantley's hospital confinement.

Mr. Brantley was admitted to the hospital on December 13, 1971. During his stay in the hospital he was treated with sedation, traction, pain pills, muscle relaxants, physical therapy, and other medications. On January 6, 1972, Mr. Brantley was discharged from the hospital. Mr. Brantley was then called into an office by a city official and asked to sign a release stating that he was not injured on the job. Mr. Brantley was informed that he could then make a claim under the hospitalization insurance carried on him by the City. When Brantley refused, Brantley was told that the City could not, "do a damm thing for me." (Tr. 47). Brantley could barely walk. He went to his family doctor who confined him to his bed for about three weeks. After he was able to walk steadily he went to his attorney who did two things. First the attorney sent the Notice letter which was received on February 16, 1972 by the City, one month and twelve days behind the required thirty set by the City Charter. Secondly the attorney sent Mr. Brantley to another orthopedic specialist who was authorized by the City to treat their employees. This orthopedic specialist reported the possibility of

a ruptured disc to the City and requested permission to hospitalize or treat Mr. Brantley. Permission was denied.

The City denied Mr. Brantley's claim. The City did not carry Workmen's Compensation Insurance. A Non-Subscriber's suit was filed by Mr. Brantley against the City. In this lawsuit the City then filed a Motion for Summary Judgment on Brantley's failure to give written Notice to the City within thirty (30) days after his accident setting out the following relevant requirements under the Charter Notice Section, City of Dallas, Ch. XXVIII, Section 1:

> "Unless the person injured, or someone in his behalf . . . stating specifically in such Notice, when, where and how the exact injury occurred, and the full extent thereof . . . together with the amount of damages claimed or asserted." (Tr. 18)

Under this Charter Notice Provision unless Petitioner filed a written Notice containing the above elements within thirty (30) days from date of his injury, the City of Dallas shall never be liable for his personal injury claim.

Consider the following relevant information in connection with the City having knowledge of, notice of, and reasonable opportunity to investigate Brantley's claim.

The City orthopedic filed a written report (Tr 38) and bill (Tr 37) with the City of Dallas. This report was made at the City's request as shown by the addressee (Tr 38). Said report was in writing. Said report was to the Street Department of the City of Dallas. Said report sets out Brantley's injuries in full. The City orthopedic wrote that Brantley, "had symptoms and findings compatible with a back strain and it was thought his condition would improve more rapidly within intensive physical

therapy and he was admitted to Methodist Hospital on the same day." (Tr. 38). This report details Brantley's injuries received and treatment rendered. (Tr. 38-39). This report further sets out the City doctor's communications with the City representative regarding Brantley's return to work (Tr. 39). Both the hospital bill and the City orthopedic doctor's bill were paid by the City of Dallas (Tr. 40-44, 12 & 15).

The City had Notice of Brantley's claim immediately after it happened through reports of Brantley's foreman and of the City Supervisor (Tr. 12, 15 & 67). The medical reports and Supervisor's reports all filtered back to the City Secretary's office through the proper administrative channels. The City paid the hospital bill of $1,484.85 (Tr. 44) and the City orthopedic's bill of $395.00 (Tr. 15, 12, and 37). The City received reports both from the Hospital and the doctors setting out injuries in details according to the doctor's opinions, findings, and examinations (Tr. 33-44). Brantley didn't know the amount of his damages when he was confined to bed, drugged with sedatives, and dulled with hospital treatment for his injuries by agents selected by the City. The City at first authorized such treatment but then refused further treatment after the expiration of thirty days from Petitioner's date of injury (Answer in Tr 15, such as 3, 3a, 3b, 4, 4a, 4b, 4c & 12 Answers to Tr 12). Petitioner relied upon the City for compensation of his loss of wages, treatment to his body, and settlement of his claim (Tr 45-49). By all outward manifestations the City volunteered such services and offers and a 5th grade employee relied upon same to his detriment. The City hospitalized Brantley barely past the 30 day time limit.

REASONS FOR GRANTING THE WRIT

1. The Texas Civil Appeals Court held, "The rule is well established in Texas that charter provisions requiring written notice of an injury within a fixed time are valid and compliance is a condition precedent to the maintenance of an action against the city." The Texas Supreme Court sustained this holding. This holding conflicts with the holding of Reich v. State Highway Department, 170 N.W. 2d 267 (Mich. Sup. 1969), Friedman v. Farmington Township School District, 194 N.W. 2d 785 (Mich. App. 1972) that such thirty (30) day notice became arbitrary once the historical purpose of providing the City with an opportunity to investigate an injured man's claim had been met and same therefore violated equal protection of the law of the Fourteenth Amendment, Due Process of Law of the Fourteenth Amendment, all of the United States Constitution. Petitioner also pleads that this holding violates his right to a jury trial under the Seventh Amendment.

ARGUMENT AND AUTHORITIES

By violating Petitioner's U.S. Constitutional guarantees of equal protection and due process of the Fourteenth Amendment and of the right to a trial by jury or in the alternative to a fair trial of the Seventh Amendment, the City is now estopped to come back and claim that their employee did not file written notice because: (1) The City has deliberately led, hospitalized, doctored, promised, and cajoled an illiterate employee into believing that all notices and requirements have been met and; (2) the City led Brantley to believe that they would provide

medical care and fairly settle his case. The City intended the Notice Provision as a special statute of limitations to trap the poor and the ignorant. This is pointed out by a special provision in the City Charter to "prevent" waiver. Page 3. Appellee's Brief, Texas Civil Appeals Court, sets out this "waiver preventing" provision:

> "Sec. 6 WAIVER OF NOTICE – Neither the Mayor, any City Councilman, the City Manager, the City Secretary, the City Attorney, or any other officer or employee of the City of Dallas, shall have the authority to waive any of the provisions of this chapter, but the same may be waived only by resolution of the City Council made and passed before the expiration of the said thirty (30) day period provided for in the above sections, which resolution shall be evidenced by the Minutes of the City Council. Such waiver shall never be made in regard to claims arising out of the immediately preceding section 5."

Dallas, a home rule city, derives its enumerated powers from Art. 1175, Tex. Rev. Civ. Stat., particularly Sec. 6 thereunder which empowers this city, "to provide for the exemption from liability on account for any claim or any damages to any person or property, or to fix such rules and regulations to govern the city's liability as may be deemed advisable."

By so fixing the City charter to "prevent" waiver the City has constructed this special "limitations" trap. Our own Texas Courts have held in Phillips v. City of Abilene, 195 S.W. 2d 147 (Tex. Civ. App. 1946) on page 50:

> "We believe that under some facts and circumstances the City may be estopped from pleading the ordinance requiring written notice.

It is well settled, however, that a municipal corporation may waive its rights under such a charter provision, and that it may also be estopped from relying thereon."

The State of Michigan has reported two cases on the constitutionality of notice provisions requiring that a governmental unit be given notice within a prescribed time. In Friedman v. Farmington Township School District, 194 N.W. 2d 785 (Mich. App. Ct. 1972), the Court considered the issue:

"Whether notice requirements concerning governmental liability violated procedural due process guarantees under the Constitution?" In the Friedman case there was a sixty (60) day notice provision. The injured party did not give the governmental unit notice within 60 days. Quoting the Michigan Supreme Court in Reich v. State Highway Dept., 17 Mich. App. 619, 170 N.W. 2d 267 (1969), 386 Mich. 617, 623, 624; 194 N.W. 2d 700 (1972), the Court quoted:

"The object of the legislation under consideration is to waive the immunity of governmental units and agencies from liability for injuries caused by their negligent conduct, thus putting them on equal footing with private tort-feasors. However, the notice provisions of the statute arbitrarily split the natural class, i.e. all tort-feasors into two differently treated sub-classes: private tortfeasors to whom no notice of claim is owed and governmental tort-feasors to whom notice is owed. This diverse treatment of members of a class along the lines of governmental or private tort-feasors bears no reasonable relationship under today's circumstances to the recognized purpose of the act. It constitutes an arbitrary and unreasonable variance in the treatment of both portions of one natural class and is, therefore, barred by the constitutional guarantees of equal protection.

"Just as the notice requirement by its operation divides the natural class of negligent tort-feasors, so too the natural class of victims of negligent conduct is also arbi-

trarily split into two subclasses: Victims of governmental negligence who must meet the requirement, and victims of private negligence who are subject to no such requirement. Contrary to the legislature's intention to place victims of negligent conduct on equal footing, the notice requirement acts as a special statute of limitations which arbitrarily bars the actions of the victims of governmental negligence after only 60 days. The victims of private negligence are granted three years in which to bring their actions . . . Such arbitrary treatment clearly violates the equal protection guarantees of our State and Federal Constitutions. The notice provision is void and of no effect."

In the Reich case, supra., the precise issue was: (page 701).

"Does the 60 day notice provision violate due process as applied to minors?" The Court held:

"The primary issue raised below and saved for appeal in this cause is whether the 60-day notice requirement of § 8 of chapter 22 of the general highway statute is constitutionally infirm when applied to a plaintiff rendered mentally or physically incapacitated by the alleged tortious act of a state or municipal defendant giving rise to the asserted cause of action. (p. 167, 180 N. W. 2d p. 779)

"***we reject and overrule the reasoning under the rule in Moulter, supre,* and condemn the purely capricious and arbitrary exercise of legislative power whereby a wrongful and highly injurious invasion of rights is sanctioned and the litigant who fails to submit the required notice of claim is stripped of all real remedy. (p. 176, 180 N.W. 2d 784) *Moulter v. Grand Rapids (1908) 155 Mich. 165, 118 N.W. 919).

"Since we dispose of this case on the basis of this plaintiff's right to due process, we do not discuss the briefed argument that the 60-day notice requirement in every case violates the equal protection clauses of the state and Federal Constitutions. Such question will undoubtedly arise in some new case where a fully competent adult is the victim."

The Reich court went on to consider the issue: Does the 60-day notice provision violate equal protection? In arriving at its holding the Court stated: (page 702)

> "Contrary to the legislature's intention to place victims of negligent conduct on equal footing, the notice requirement acts as a special statute of limitations which arbitrarily bars the actions of the victims of governmental negligence after only 60 days the victims of private negligence are granted three years in which to bring their actions . . . Such arbitrary treatment clearly violates the equal protection guarantees of our State and Federal Constitutions. The notice provision is void and of no effect."

In 40 Tex. Jur. 2d § 651 XVII CLAIMS AGAINST MUNICIPALITY

In general; Presentation of claim or notice of injury.

> "One purpose of a requirement for written notice of injury is to give the city an opportunity to make investigations while the facts are fresh and while conditions remain substantially the same, thereby enabling it to guard against fraudulent and unfounded claims, to prepare for trial if it decides not to settle, or to make a settlement and avoid litigation. Another purpose is to put the claimant on record as to how the accident occurred, the nature and extent of the injury, as well as the time and place of the accident to avoid those matters resting in parol until the time of trial."

The purpose of the city's notice provision was therefore to:

(1) give the city an opportunity to investigate while the facts are fresh;

(2) put the claimant on record as to how the accident occurred, the nature and extent of the injury, and the time and place of the accident.

In the Brantley case, the forman saw the plaintiff get hurt, a city official took plaintiff to a city selected doctor, the city

received reports from said doctor and from the plaintiff, and plaintiff reported his accident in detail to several city representatives on different occasions (Tr 45-49). All the reasons for the notice provision were met.

Art. 5526, Tex, Rev. Civ. Stat., reads:

"Actions to be commenced in two years

There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:

. . . .

6. Action for injury done to the person of another."

The Texas Statutes therefore grant two years to the average injured party to file a lawsuit. The City notice grants thirty days. The City notice places persons injured by governmental tortfeasors on a different standard from those injured by private tortfeasors. In Texas a person injured by a private tortfeasor has two years to bring a cause of action; a person injured by a City tortfeasor has 30 days. The City charter notice provision deprives the injured person of an additional 23 months he would have under the Texas statute to bring his cause of action. The Texas Courts uphold this deprivation.

In Indiana a woman stepped into a manhole while trying to mail a letter. Her husband contacted the police who inspected the accident scene, her husband then telephoned the City Attorney's office, her husband later conferred several times with claims representatives from the City. The Trial Court held that proper statutory notice was not served. The appellant Court Affirmed. In Galbreath v. City of Indianapolis, 255 N.E. 2d 225 (Ind. Sup. Ct. 1970) on page 229 the Court held:

> "However, given the reasons and purpose of the notice requirement as set out (in Aaron), we can see no logical basis upon which this distinction can rest . . . . The purpose of the notice statute being to advise the city of the accident so that it may properly investigate the surrounding circumstances, we see no need to endorse a policy which renders the statute a trap for the unwary where such purpose has in fact been satisfied."

The Court reasoned that as long as there was substantial compliance with the purpose of the statute, oral or written, this was all that was necessary. Another Court has reasoned:

> "(The Court's) opinion says that so long as the District can prepare its defense, it is 'most unreasonable' to require a sufficient notice. Such reasoning would sustain any claim, whether in writing or not, no matter what the source of the District's information, no matter when the suit is brought." Stone v. District of Columbia, 327 Fed 2d 28 (D.C. Cir. 1956), Cert. Den.

Under the Galbreath case the Court extended the reasoning to include receipt of notice by official with no legislative authority, oral notice, late filing, or even no notice at all. A broad reading of Galbreath indicates a harmless error doctrine. This is analogous to Fed. R. Civ. Proc. R. 61 which provides: "The Court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." Such a doctrine differs from one of the traditional escape mechanisms from the statute, equitable estoppel, in that the claimant need not rely on affirmative actions of the city to be excused from compliance. Rabinowitz vs. Town of Bay Harbor Island, 178 S. 2d 9 (Fla. 1965).

Under such reasoning, a plaintiff who fails to notify the named statutory official will not be denied a remedy unless the city is prejudiced. As a result the courts will protect the city's

interest without hindering legitimate claimants who are unaware of the proper procedure. A logical corollary to Galbreath's recognition that notice requirements are a precedural limitation on plaintiff's common law right, is that the City should bear the burden of proving it has been prejudiced. The City's reliance on the literal terms of the statute such as in the Brantley case here under the Dallas Charter provisions and when the statutory purpose has been served of giving notice so that the City can investigate the claim, penalizes unwitting claimants and grants governmental immunity to the City for no reason. Such a result fights an obsolete rear echelon skirmish against the trend towards abolition of governmental tort immunity. More and more legal scholars advocate abolition of governmental tort immunity. They reason that the City is the best loss-shifter through taxes and insurance. Borchard, Government Liability in Tort, 34 Yale, L.J. 1 (1924); Borchard, Governmental Responsibility in Tort VI, 36 Yale L.J. 1; Borchard, Governmental Responsibility in Tort VII, 28 Colum L. Rev. 577 (1928); Report, supra. note 4; Note, The Decline of Sovereign Immunity in Indiana, 36 Ind. L.J. 468 (1948); and Brinkman v. City of Indianapolis, 141 Ind. App. 662, 231 N.E. 2d 169 (1967).

One Texas case traces the law's trend line in abolishing notice to governmental units. This case involved a City provision requiring that an injured party obtain consent of a majority of city commissioners within 90 days after his injury. City of Terrell v. Howard 111 S.W. 2d 692 (Comm. App. 1938, opinion adopted by the Supreme Court).The Court reasoned:

> "... the effect of the amendment viewed in its entirety is clearly to violate plaintiff's constitutional guarantee that 'All Courts shall be open, and every person for an injury done him, in his ... person ... shall have remedy by due process of law." Const. Texas Art. 1 § 13.

The U.S. Supreme Court has continued the extension of the right to trial by jury into civil cases, such as the Brantley case here. United States v. Barnett, 376 U.S. 681 (1964); Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963); Duncan v. Kahanamoku. 327 U.S. 304 (1946). By using the phrase "fundamental to the American scheme of justice," the Court apparently recorded its current test for determining the applicability of Bill of Rights guarantees against the states. Since Gideon v. Wainwright, 372 U.S. 335 (1963), the Court had applied this test: whether the asserted right was "a fundamental right, essential to a fair trial." Earlier the Court had worded it: "basic in our system of jurisprudence." In re Oliver, 333 U.S. 257, 273 (1948).

Several distinct theories are available for judging the validity of state action under the due process clause. The "absorption" theory would incorporate into the fourteenth amendment all the specific guarantees found in the Bill of Rights. Adamson v. California, 332 U.S. 46, 63-123; Pointer v. Texas, 380 U.S. 400 (1965). A second theory has read the due process clause as a guarantee of those privileges "implicit in the concept of ordered liberty," Palko v. Connecticut, 302 U.S. 319, 325 (1937), and a prohibition of state actions which violate canons of "fundamental fairness." Betts v. Brady, 316 U.S. 455, 462 (1942).

The Brantley case meets all these tests of requiring fair trial by jury as guaranteed by the Seventh Amendment in Civil Cases.

(2) Does a thirty (30) day written notice of personal injury claim provision as required by the City Charter constitute a governmental tort immunity which violates the equal protection of the law and the due process of law of the Fourteenth Amendment of the Constitution of the United States of America?

Position of States with regard to Doctrine of Governmental Immunity[1]

JUDICIALLY ABROGATED	STATUTORILY ABROGATED	MODIFIED	INSURANCE WAIVER THEORY	COMMON LAW
Alaska	Hawaii	Connecticut	Georgia	Alabama
Arizona	Iowa	South Carolina	Kansas	Arkansas[2]
California	New York	Texas	Maine	Delaware
Colorado	Oklahoma		Mississippi	Maryland
Florida	Oregon		Missouri	Mass.
Idaho	Utah		Montana	Penn.[3]
Illinois	Washington		New Hampshire	So. Dakota
Indiana			New Mexico	Virginia
Kentucky			North Carolina	
Louisiana			North Dakota	
Michigan			Ohio	
Minnesota			Tennessee	
Nebraska			Vermont	
Nevada			West Virginia	
New Jersey			Wyoming	
Rhode Island				
Wisconsin				
District of Columbia				

[1]This compilation is based on material presented in Restatement, Second, Torts §895A at 12-20 (Tentative Draft, March 30, 1973).

[2]Judicially abolished but statutorily reinstated.

[3]Judicially abrogated in Ayala v. Philadelphia Board of Public Education, 305 A. 2d 877 (Penn. Sup. Ct. 1973)

Justice Roberts's Ayala opinion traces the governmental tort immunity rule back to its English roots.

> It is generally agreed that the historical roots of the governmental immunity doctrine are found in the English

> case of Russell v. Men of Devon, 2 T.R. 667, 100 Eng. Rep. 359 (1788). See e.g. Parish v Pitts, supra; Molitor v. Kaneland Community Unit District No. 302, supra; Prosser, Handbook on the Law of Torts 1004 (3d ed. 1964); Stason, Governmental Tort Liability Symposium, 29 N.Y.U.L. Rev. 1321 (1954); Borchard, Governmental Liability in Tort, 34 Yale L.J. 1 (1924). There, the court, in extending immunity to an unincorporated county, expressed the fear that if suits against such political subdivisions were permitted, there would be "an infinity of actions." Russell v. Men of Devon, supra at 672, 100 Eng. Rep. at 362. That court was also influenced by the absence of a fund "out of which satisfaction is to be made." Id. Finally, Justice Ashurst, expressing the eighteenth century societal evaluation of the individual and local governmental interests, observed that it is better that an individual should sustain an injury than that the public should suffer an inconvenience." Id. . . . .
>
> "[e] very reason assigned by the court [in Russell] is born of expediency. The wrong to plaintiff is submerged in the convenience of the public. No moral, ethical, or rational reason for the decision is advanced by the court except the practical problem of assessing damages against individual defendants."

Extension of the theory that the "King can do no wrong" to political subdivisions is especially suspect in light of Professor Jaffe's observation that, historically, the "major effect of the doctrine of soverign immunity was procedural. Claims in form 'against the Crown' were to be pursued by 'petition of right.'" Jaffee, Suits Against Governments and Officers: Sovereign Immunity, 77 Harv. L. Rev. 1, 18 (1963). See also Borchard, Government Liability in Tort, 34 Yale L.J. 1 (1924).

In Mower v. Leicester, 9 Mass. 247 (1812) the Massachusetts court relying upon Russell, supra, held that an incorporated county was immune from liability for the tortious conduct of its employees.

> "... the only similarity between the situation in New England and the Russell case lay in the fact that the defendants were counties. The New England county was incorporated, had a corporate fund and the means of enlarging it by taxation and was charged by statute with the duty of keeping highways in repair. Under the authority of Russell v. Devon, therefore, practically no reason for immunity can be found in these circumstances to exist, yet the Massachusetts court passed judgment for the defendant on the unconvincing ground that the county was a quasi-corporation created by the legislature for purposes of public policy and not voluntarily, like a city, and that as a State agency it was therefore immune. This poorly reasoned decision, based upon a case which contradicts rather than sustains it, has been followed very generally in New England and has become the 'common law' of the states of the United States, with few exceptions."

In Morris v. Mount Lebanon Township School District, 144 A. 2d 737, 738 (1958) the Court held that school districts *like municipal corporations,* "are not immune from liability in tort for the negligent acts of their servants . . "

In Molitor v. Kaneland Community Unit District no. 302, 163 N.E. 2d 94, the Court reasoned:

> ... it is almost incredible that in this modern age of comparative sociological enlightenment, and in a republic, the medieval absolutism supposed to be implicit in the maxim, "the King can do no wrong," should exempt the various branches of the government from liability for their torts, and that the entire burden of damage resulting from the wrongful acts of the government should be imposed upon the single individual who suffers the injury, rather than distributed among the entire community constituting the government, where it could be borne without hardship upon any individual, and where it justly belongs.' Barker v. City of Santa Fe, 47 N.M. 85, 136 P. 2d 480, 482. Likewise we agree with the Supreme Court of Florida that in preserving the sovereign immunity theory, courts have

> overlooked the fact that the Revolutionary War was fought to abolish that 'divine right of kings' on which the theory is based.

Refering to the philosophy that a municipality's liability should follow its tortious conduct causing injury to individuals, legal scholars reason:

> Moreover, we are unwilling to perpetuate the notion that "it is better that an individual should sustain an injury than that the public should suffer an inconvenience." Russell v. Men of Devon, supra at 673, 100 Eng. Rep. at 362. This social philosophy of nonliability is "an anachronism in the law of today." Flagiello v. Pennsylvania Hospital, 417 Pa. 486, 502, 208 A. 2d 193, 201 (1965). As has been noted:
>
> "The social climate which fostered the growth of absolutism and the divine right of kings in England has long since been tempered with the warm winds of humanitarianism and individual freedom. The changes which have occurred in the last century with respect to the imposition of liability upon private corporate enterprises of any kind are well-known. Workmen's Compensation Laws have replaced the old theories which permitted the corporate organizations to escape liability under the fellow-servant rule or the doctrine of assumption of risk. Liability may now be predicated without fault merely on grounds that potential injuries to individuals must be calculated as a part of the cost of doing business and must be paid for by the business enterprise. There is widespread acceptance of a philosophy that those who enjoy the fruits of the enterprise must also accept its risks and attendant responsibilities." Smith, Municipal Tort Liability, 48 Mich. L. Rev. 41, 48 (1949).

Later in 2 Harper and James, Torts, 622 (1956) the reason for permitting governmental units to escape liability based on a type of immunity such as notice provision in this case is discussed.

> "As we have stated many times before, today cities and states are active and virile creatures capable of inflicting great harm, and their civil liability should be co-extensive. Even though a governmental entity does not profit from its projects, the taxpaying public nevertheless does, and it is the taxpaying public which should pay for governmental mal-administration. If the city operates or maintains injury-inducing activities or conditions, the harm thus caused should be viewed as a part of the normal and proper costs of public administration and not as a diversion of public funds. The city is a far better loss-distributing agency than the innocent and injured victim."

Even before Harper and James' renunciation, Prosser in Intentional Infliction of Mental Suffering: A New Tort, 37 Mich. L. Rev. 874 (1939) prefaced the fallacy of any governmental tort immunity arguments such as the one in Brantley arising from failure to give notice within thirty (30) days:

> . . . more compelling than an academic debate over the apparent or real increases in the amount of litigation, is the fundamental concept of our judicial system that any such increase should not be determinative or relevant to the availability of a judicial forum for the adjudication of impartial individual rights. 'It is the business of the law to remedy wrongs that deserve it, even at the expense of a "flood of litigation"; and it is a pitiful confession of incompetence on the part of any court of justice to deny relief upon the ground that it will give the courts too much work to do.

Regarding Prosser's plea for a judicial forum for adjudicating an injured person's rights verus a governmental tort immunity preventing the accessibility to such a forum, the Ayala opinion, supra, held:

> "We obviously do not accept the 'too much to do' rationale. We place the responsibility exactly where it should be: not in denying relief to those who have been injured, but on the judicial machinery of the Common-

wealth to fulfill its obligation to make itself available to litigants." (305 A 2d 882)

In Parish v. Pitts, 244 Ark. 1250-1251, 429 S.W. 2d 51; Note, Municipal Tort Liability in Pennsylvania-Checkered Immunity, 100 U. Pa. L. Rev. 92, 105 (1951) the following information was stated:

> "Figures actually compiled showing the claims experience in typical cities show that the spectre of the crippling judgment, as a deterrent to abrogation of procedural or substantive immunities, so far as [sic] not materialized in any great degree. The force of the 'crippling judgment' may be vitiated by self-insurance or commercial insurance . . . So far as known, municipal insolvency proceedings in the federal courts have not occurred because of tort judgment."

Dean Prosser commented on this fact of a just forum verus governmental tort immunity in two separate writings:

> "Virturally all writers have agreed that no one of these reasons for denying liability is sound, and all of them can be found to have been rejected at one time or another in the decided cases. The current of criticism has been that it is better that the losses due to tortious conduct should fall upon the municipality rather than the injured individual, and that the torts of public employees are properly to be regarded, as in other cases of vicarious liability, as a cost of the administration of government, which should be distributed by taxes to the public."

Prosser, supra at 1004-05.

> "The 'prophylactic' factor of preventing future harm has been quite important in the field of torts. The courts are concerned not only with compensation of the victim, but with admonition of the wrongdoer. When the decisions of the courts become known, and defendants realize that they may be held liable, there is of course a strong incentive to prevent the occurrence of the harm. Not infrequently one reason for imposing liability is the deliberate purpose of providing that incentive."

Prosser, supra 23.

In Holytz v. City of Milwaukee, the Wisconsin Supreme Court abolished governmental tort immunity:

> "We are satisfied that the governmental immunity doctrine has judicial origins. Upon careful consideration, we are now of the opinion that it is appropriate for this court to abolish this immunity notwithstanding the legislature's failure to adopt corrective enactments." 115 N.W. 2d 623.

In writing on The Growth of the Law, page 136-137 (1924), Justice Cardozo brilliantly reasoned the end of governmental tort immunity:

> "A rule which in its origins was the creation of the courts themselves, and was supposed in the making to express the mores of the day, may be abrogated by the courts when the mores have so changed that perpetuation of the rule would do violence to the social conscience."

In the Ayala decision, supra, Justice Manderino closes, "No branch of government-the executive, the legislative, or the judicial branch-can deprive a citizen of proper redress for a wrong. The denial of justice in any case is not constitutionally permitted."

The second part of this question involves whether or not the notice provision constitutes governmental tort immunity. Consider this exact Brantley case. The claimant failed to file a notice within the thirty (30) day charter required period. Thereafter a Motion for Summary Judgment was sustained by the Trial Court. The Texas Appeals Court and the Texas Supreme Court sustained the Trial Court's denial of a forum to the City's injured employee because he was 43 days late in giving the City a prescribed formal written notice. As of this writing Brantley has been deprived of a forum to bring his action for personal injuries. The City has thus received a form of governmental

immunity. By its charter notice requirement, the City has made itself immune from any further suit by Brantley. The Texas Courts have enforced this deprivation.

Two recent cases in Louisiana and in Nevada uphold the abolishment of sovereign immunity in any form. In the Louisiana Supreme Court decision on Board of C. of P. of New Orleans v. Splendour S. & E. Co., 273 So. 2d 19 (1973), there was an action by a shop owner against the port commissioners for damage to his ship on appeal by the ship owner from the dismissal of his claim by the lower court on the grounds of governmental tort immunity of the State Board of Commissioners. The Louisians Supreme Court struck down governmental tort immunity:

> Hardly any legal doctrine has received more criticism in the United States than doctrine of sovereign immunity.
>
> Considering the source of the doctrine and its history, there are three reasons which move us to withdraw from the Board the immunity with which the court has previously insulated it from tort suits. It is unfair. It tends toward governmental irresponsibility. It is an unnecessary exception to the policy of the State of Louisiana as expressed in two articles of our Constitution.
>
> Here the Board sues, and when [shipowner] reconvenes on a claim arising from the same accident, the Board cries, 'King's X! You can't sue me.' Not even the Board claims that its immunity is fair and just – only legal and traditional. The injustice may not be shocking to lawyers, accustomed to the frequent forfeiture of private advantage for public good. But when an unfair doctrine does not function for the public good, but only for the administrative convenience of a State agency, the court should do whatever it can to infuse justice in the relationship between the State agency and the private person.
>
> Governmental responsibility is needed more today than ever. There is hardly any sector of private life and activity

> free from governmental intervention. The myriad State agencies and their employees almost defy inventory, to say nothing of control by the people whom they purport to serve. It has not been the policy of the legislature to permit employees of agencies to injure, intentionally or carelessly, private citizens. It is and should be the policy of the State, enforced through its courts, to require boards and agencies to act responsibly, or be subject to answer in court.

In Turner v. Staggs and Clark County, 510 P. 2d 879 (Nev. Sup. Ct. 1973), the Nevada Supreme Court held:

> (1) That its notice of claim statute, requiring all claims against counties to be filed within 60 Days of their Accrual violates 14th Amendment's equal protection and is Unconstitutional;
>
> (2) That same violates Equal Protection where governmental notice of claim statute arbitrarily bars victims of governmental tort but leaves unimpaired rights of victims of Private Tort.

The Turner case, supra, involved a suit for the wrongful death of Barbara Adams, "black, sick and impoverished when she died leaving three children in their early minority." She had been admitted to a county hospital with a kidney infection and a heart complication. She was discharged upon the condition that she would be taken to Los Angeles for futher treatment. Three days later she expired on an ambulance bed enroute to the hospital. The autopsy revealed death due to lack of treatment for her pre-diagnosed diseases. The children filed a lawsuit thirteen months after their mother's death. The complaint was originally dismissed on a Motion for Summary Judgment, as in the Brantley case herein, because of Plaintiffs' failure to present the claim within 6 months after it arose as required by State Law Nrs. 244.250.

On appeal the Nevada Supreme Court concluded, "The

statutory provisions of this state which provide that no person shall sue a governmental entity of this state for a demand arising out of governmental tort unless they first present a claim within 6 months from the time such tort occurred are void and of no effect."

In discussing the 14th Amendment's equal protection clause in the Turner case, supra, the Nevada Supreme Court stated, "Within our present scheme of government, claim statutes serve no real beneficial use . . . but are a trap for the unwary. If we follow [a prior contrary case], the minors' cause of action will be barred. They will be precluded from enforcing a liability created by statute for their benefit. Such construction of [our notice-of-claim statutory provision] creates invidious discrimination and amounts to a denial of due process and equal protection of the law."

The Nevada Supreme Court pointed out in Turner, supra, that the State statute of limitations divided all tortfeasors into two irrational classes of wrongdoers: (1) private tortfeasors to whom no notice of claim is owed and (2) governmental tortfeasors to whom notice is owed. The Nevada Supreme Court ruled that this 6 months' statute in view of the much longer statute allowed private tortfeasors was not rationally related to any valid public purpose and therefore violated the equal protection clause of the Fourteenth Amendment. So far as any right of notice of claim was concerned the classes of tortfeasors (public and private) could not be rationally and hence constitutionally differentiated. Fencing out the victims of governmental tort because of failure of a duty timely to notify about the claim (an obligation not resting upon victims in the private tort sector) was constitutionally impermissible. To disenfranchise

victims of public torts was discriminatory state action which bore no reasonable relationship to legitimate state goals.

In the Turner case, supra., Nevada Justice Batjer drew analogical support for his invalidation of the 6 month statutory notice of claim requirement from two recent Michigan decisions. In Grubaugh v. City of St. Johns, 180 N.W. 2d 778 (Mich. 1970) involving serious harm to a 19 year old infant plaintiff, in a car accident caused by a chuckhole in a street, the Michigan Supreme Court held that a 60-day notice requirement to municipalities was unconstitutional under both Federal and State Due Process clauses (whereas in Brantley the accident victim was rendered mentally and physically incapacitated). Plaintiff's car struck a chuckhole, splashing water across the windshield, thereby obscuring the driver's vision and causing him to lose control and strike a tree. Plaintiff, unconscious and in a state of shock, was taken by ambulance to a hospital where he was treated for a fractured jaw and other fractured facial bones, a skull fracture, and a brain concussion. He was discharged from the hospital on April 2, 1961, but continued under the care and treatment of physicians until some time during the latter part of August, 1961. The accident occurred on March 19, 1961; September 5, 1961, plaintiff's guardian sued the city.

> "In striking down the 60-day notice provision as violative of the due process clause, the Michigan Supreme Court explicitly overruled a 62 year old contrary decision.
>
> Grubaugh was further extended in the splendid milestone decision in Reich v. State Highway Dep't, 194 N.W. 2d 700 (Mich. 1972), 15 ATL News L. 233-34 (June 1972). In Reich the court held that the Michigan State Tort Claim Act's 60-day notice requirement violated federal and state due process clauses and in portecting only governmental tortfeasors, denied equal protection by arbitrarily splitting the natural class of all tortfeasors into pro-

> tected (governmental tort-feasors) and exposed (private tort-feasors): 'This diverse treatment of members of a class along the lines of governmental or private tortfeasors bears no reasonable relationship under today's circumstances to the recognized purpose of the act. It constitutes an arbitrary and unreasonable variance in the treatment of both portions of one natural class and is, therefore, barred by constitutional guarantees of equal protection.
>
> Just as the notice requirement by its operation divides the natural class of negligent tortfeasors, so too the natural class of victims of negligent conduct is arbitrarily split into two subclasses: victims of governmental negligence who must meet the requirement, and victims of private negligence who are subject to no such requirement." 194 N.W. 2d at 702.

In Turner, supra, Justice Batjer adopted the insights of Reich for Nevada and held that the discriminatory treatment of victims of public torts as compared with victims of private wrongdoers (in the 6 month statutory notice of claim requirement applicable only to the former) could not survive the constitutional scrutiny of equal protection.

The Texas limitations statute Art. 5526 and Home Rule Statute Art. 1175 arbitrarily divide tortfeasors into two classes of private and governmental. Aided by City of Dallas's Charter provisions, these Texas statutes allow a person injured by the City only 30 days to "bring" his cause of action. If he (injured) doesn't file the required notice within 30 days of his accident date, he is barred from bringing a cause of action. Brantley proves that. The State Courts back up the City's nauseous notice.

CONCLUSION

After the City has been given an opportunity to investigate the facts of a personal injury case, the City then creates a special statute of limitations, or governmental immunity-if you will, through its nauseous notice. The City springs nauseous notice like a punji trap. While the City holds an apple in front of the poor ignorants which they chase, time runs out. Thirty days springs nauseous notice. The punjis do the rest. Nauseous notice saves the municipality money. The educated, the rich hire lawyers to give the City proper written notice within thirty days. The poor ignorants save the City money. The City probably saves thousands every year.

Nauseous Notice prevents anyone from making a claim against the City after failing to file the magicial written notice lawsuiting all the required elements within thirty days after their accident. The Texas Statute of limitations, Art. 5526, supra, grants victims of private tortfeasors two years in which to file their claims. Under these circumstances the City abuses-uses the 30 day notice in such a way to violate due process and equal protection of the Fourteenth Amendment and right to a jury trial under Seventh Amendment of the U.S. Constitution. The City led a man into the hospital, put him in bed, and drugged him. After 30 days the City kicked him out. Backed by the State Courts, the City now says he doesn't have a right to a trial because he failed to give them notice while they had him drugged in the hospital.

Respectfully submitted,

Mark Delk

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Dallas, Texas 75201 742-3109

Appendices Separately Attached

A. Appeal from the 160th Judicial District Court of Dallas County, Texas;
B. Order of Civil Appeal Court;
C. Appellant's Motion for Rehearing in Civil Appeals Court with Brief;
D. Order Overruling Appellant's Motion for Rehearing in Civil Appeals Court;
E. Application for Writ of Error to Supreme Court of Texas;
F. Order n.r.e. Overruling Application for Writ of Error;
G. Appellant's Motion for Rehearing on Application for Writ of Error;
H. Order Overruling Appellant's Motion for Rehearing on Application for Writ of Error.
I. Motion to withdraw mandate pending appeal to United State Supreme Court.
J. Order withdrawing mandate.

PROOF OF SERVICE

I, Mark Delk, Attorney for Ezra Charles Brantley, Petitioner herein, and a member of the Bar of the Supreme Court of the Unived States, hereby certify that on the 17th day of January, 1974, I served a true and correct copy of the foregoing Petition for a Writ of Certiorari on Appeal From the Supreme Court of the State of Texas to the City of Dallas, Respondent herein, by personally hand delivering said instrument to said City's Attorney of record, Leigh Bartlett, Assistant City Attorney, City of Dallas, Texas 75201.

It is further certified that all parties required to be served have been served.

Mark Delk

MARK DELK, Attorney for Petitioner
4314 Republic National Bank Tower
Dallas, Texas 75201 742-3109

Supreme Court, U. S.
FILED
FEB 19 1974
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-6206

EZRA CHARLES BRANTLEY,
Petitioner,

v.

CITY OF DALLAS,
Respondent.

On Petition for a Writ of Certiorari
On Appeal From the Supreme Court of Texas

BRIEF OF THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In The

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-6206

EZRA CHARLES BRANTLEY,

Petitioner,

v.

CITY OF DALLAS,

Respondent.

On Petition for a Writ of Certiorari
On Appeal From the Supreme Court of Texas

BRIEF OF THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATUTORY PROVISIONS INVOLVED

Petitioners' appeal herein challenges the constitutionality of Sections 1 and 6, CHAPTER XXVIII of the Charter of the City of Dallas.

Section 1 of CHAPTER XXVIII provides:

> "NOTICE REQUIRED — PERSONAL INJURY — The City of Dallas shall never be liable for any personal injury, whether resulting in death or not, unless the person injured, or someone in his behalf, or in the event the injury results in death, the person or

persons who may have a cause of action under the law by reason of such death injury, shall file a notice in writing with the City Manager or City Secretary within thirty (30) days after the same has been received, stating specifically in such notice, when, where, and how the exact injury occurred, and the full extent thereof, together with the amount of damages claimed or asserted."

Section 6 of CHAPTER XXVIII provides:

"WAIVER OF NOTICE — Neither the Mayor, any City Councilman, the City Manager, the City Secretary, the City Attorney or any other officer or employee of the City of Dallas, shall have the authority to waive any of the provisions of this chapter, but the same may be waived only by the resolution of the City Council made and passed before the expiration of the said thirty (30) day period provided for in the above sections, which resolution shall be evidenced by the Minutes of the City Council. Such waiver shall never be made in regard to claims arising out of the immediately preceding section 5."

QUESTIONS PRESENTED BY PETITIONERS

(1) Does the thirty (30) day notice provision contained in the City of Dallas Charter violate the Fourteenth Amendment to the United States Constitution?

(2) Does the thirty (30) day notice requirement contained in the City of Dallas Charter violate the Seventh Amendment to the United States Constitution?

STATEMENT OF THE CASE

On or about December 3, 1971, Ezra Charles Brant-

ley was an employee of the City of Dallas working in the Street Maintenance Division of the Public Works Department. On December 9, 1971 Brantley reported to his superior that he had been hurt on the job on December 8. (Tr. 15) He was sent to a general practitioner who referred him to an orthopedic specialist, Dr. Howard Y. Sigler, on December 13, 1971. Brantley was subsequently hospitalized and treated by Dr. Sigler. He requested, and obtained several passes to leave during the time he was hospitalized. He was released on January 6, 1972 upon Dr. Sigler's recommendation that he was able to return to work. (Tr. 38, 39)

The City paid all hospital and doctor bills incurred by Brantley from the date he reported an injury until January 6, 1972, when the attending physician determined that Brantley was able to return to work. (Tr. 41-44)

Brantley's written notice of claim was filed with the City Manager on February 16, 1972 — seventy-four (74) days after December 3, 1971, the date Brantley's injuries were alleged to have occurred. (Tr. 65)

Defendant filed a Motion for Summary Judgment on the basis that Plaintiff had failed to comply with CHAPTER XXVIII, Sec. 1 of the Charter of the City of Dallas and that no waiver of the notice requirements had been made in behalf of the Plaintiff, pursuant to CHAPTER XXVIII, Sec. 6 of the Charter. (Tr. 18-20)

Summary Judgment in favor of the City of Dallas was granted by the trial court. (Tr. 83) That judgment was affirmed by the Court of Civil Appeals (Appendix B), and Petitioner's Application for Writ of Error was refused by the Supreme Court of Texas, No Reversible Error (Appendix F).

ARGUMENT AND AUTHORITIES

I.

The Eleventh Supreme Judicial District Court of Civil Appeals of Texas Made a Correct Statement of the Texas Law in Its Opinion By Its Statement That "The Rule Is Well Established in Texas That Charter Provisions Requiring Written Notice of an Injury Within A Fixed Time Are Valid and Compliance Is A Condition Precedent to the Maintenance of an Action Against the City," and Correctly Affirmed the Judgment of the Trial Court: The Supreme Court of Texas Was Correct in Refusing Petitioner's Writ of Error, No Reversible Error.

The Supreme Court of Texas has consistently upheld the validity of Charter provisions requiring notice of an injury within a given time and the requirement that compliance therewith is a condition precedent to the maintenance of an action for such injury. *City of Dallas v. Shows,* 212 S.W. 633 (Comm. App., 1919, judgment adopted by the Supreme Court); *Cawthorn v. City of Houston,* 231 S.W. 701 (Comm. App., 1921, judgment adopted by the Supreme Court); *City of Terrell v. Howard,* 111 S.W. 2d 692 (Comm. App., 1938, opinion adopt-

ed by the Supreme Court); *Phillips v. City of Abilene,* 195 S.W. 2d 147 (Tex. Civ. App. 1946, writ ref'd.); *City of Houston v. Hruska,* 283 S.W. 2d 739 (Tex. 1955); *Barrett v. City of Dallas,* 490 S.W. 2d 605 (Tex. Civ. App. 1973, n.w.h.).

Three of the above cases have a direct bearing, by virtue of quite similar situations, on the case at bar.

In *Phillips v. City of Abilene,* supra, the Plaintiff filed a damage suit against the city for personal injuries. The city contended that Plaintiff had failed to comply with the charter notice requirement, which contained a mandatory non-waiver provision similar to the City of Dallas' Charter sections which are controlling in this case. Plaintiff asserted substantial compliance with the charter provision because on the day after the accident in question, he went to the office of the Mayor (The charter provision specified notice in writing within thirty days to the Mayor or to the Board of Commissioners), and told the Mayor personally the date on which his wife stepped into a water meter, where and how the accident occurred, and that she was injured as a result. The Mayor jotted down some notes as Plaintiff talked to him and told Plaintiff he would "present this to the Commission." Plaintiff further asserted waiver of the notice requirement due to the acts and conduct of the Mayor, and asserted that the city was estopped, due to the Mayor's acts and conduct, to assert the defense of no notice. The Court of Civil Appeals at Eastland upheld judgment n.o.v. for the Defend-

ant on the ground that there was no fact issue concerning notice — Plaintiff had failed to comply with a condition precedent, the filing of notice pursuant to the city charter provision, as a matter of law. The following excerpts from the *Phillips* opinion demonstrate conclusively that Plaintiff's contentions in this lawsuit are without merit and cannot operate to constitute compliance with the City of Dallas notice provision, even if all of the allegations by Plaintiff are taken as proven facts. The opinion also establishes that no assertions of waiver or estoppel can be maintained in this action since the City of Dallas Charter contains a mandatory non-waiver provision.

> "The law is well settled in Texas that an ordinance such as the one involved here, requiring a written claim for personal injury against the city to be filed within thirty days, is mandatory, and that such filing is a condition precedent before a suit can be maintained against the city for such injury. [p. 148]
>
> * * *
>
> It is further well settled that actual knowledge of the city officials of all of the facts necessary to be stated in this notice is not sufficient to comply with the law that requires that the notice be in writing and presented to the city commission. [p. 148]
>
> * * *
>
> As will be seen from reading the ordinance with reference to the written notice, it provides that the provisions thereof cannot be waived by an officer or employee of the city, but may be waived only by resolution of the Board of Commissioners. [p. 150]
>
> * * *

> If it should be held that the City was estopped by reason of the acts and conducts of the Mayor and City Commissioners, then that portion of the ordinance that prohibits a waiver of the written notice would be nullified. The doctrine of estoppel cannot be invoked to nullify a mandatory statutory restriction. . . . The city cannot be estopped by unauthorized acts of its officers." [p. 150]

The Supreme Court of Texas, in *City of Houston v. Hruska,* supra, expressly approves the *Phillips* opinion. In the *Hruska* case it was contended, and the jury found, that the Plaintiff was lulled into a false sense of security by the acts and conduct of city employees, which caused him as a reasonably prudent person not to file his claim until a year after the accident in question and a week after his salary was discontinued. The Plaintiff was a city employee who had been kept on the city's payroll (with the notation "Injured") for approximately a year, without his doing any work for the city during that period. The Supreme Court, after reaffirming the validity of the notice requirement and the mandatory non-waiver provision, held that the city could not be estopped to assert as a defense its charter provision requiring written notice of claim.

As recently as January of 1973, the requirement to file written notice of claim pursuant to an applicable charter provision was upheld. *Barrett v. City of Dallas,* supra, involved a suit against the City of Dallas to recover damages for personal injuries allegedly suffered by the Plaintiff while employed by the city. The Plaintiff contended that "by hav-

ing established a custom, practice, and policy of payment of medical expenses for injured employees, which lulled him into believing that it would not be necessary for him to file his claim at any certain time, Appellee was estopped to demand strict compliance with the notice provision." In the *Barrett* opinion the Dallas Court of Civil Appeals held that the charter provisions in question are valid and that compliance therewith is mandatory. The court further held that by virtue of the mandatory non-waiver provision, the acts of the city and city employees which were complained of could not estop the city from asserting non-compliance with the notice provision.

> "[P]ayment of medical expenses 'is simply not a representation that notice of a claim for *damages* is waived.' He knew the city was paying his medical expenses, but this gave him 'no reason to be misled about notice of a claim he might file for damages at common law.'
>
> * * *
>
> Appellee's custom to pay medical expenses of its employees injured in line of duty, even though administered by duly authorized agents of Appellee, is not such conduct of the city as would be any evidence of waiver or any basis for application of the doctrine of estoppel, not because the payment for the medical expenses was not authorized, but because Section 6, of Chapter XXVIII, of the Charter sets forth an exclusive means of waiving the notice provision in Sec-1, a method entirely different from the acts relied on by Appellant.
>
> Dallas is a home-rule city, and Appellant is charged with knowledge of the provisions of its Charter. His position must therefore be assessed as though he had

> actual knowledge thereof. Knowing that the Charter required him to file written notice of his claim within thirty days after his injury, and also knowing that no officer or employee of Appellee had authority to waive that requirement, and that it could be waived only by resolution of the City Council passed within the thirty days, Appellant is in no position to assert that Appellee's custom of paying medical expenses over a period exceeding the thirty day period constituted a representation to him that the city would do what he knew it could not do by that means, i.e., waive compliance with the notice provision of the Charter."

The summary judgment proof on file shows conclusively that Appellant failed to comply with the requirements of the applicable charter provisions. As a result, there is no genuine issue as to any material fact, and the Summary Judgment granted Respondent by the trial court was proper.

* * *

Petitioner, in his brief at Page 10, argues that "by violating Petitioner's U. S. Constitutional guarantees of equal protection and due process of the Fourteenth Amendment and of the right to trial by jury or in the alternative to a fair trial of the Seventh Amendment, the City is now estopped to come back and claim that the Petitioner did not file written notice." Contrary to his statement by Petitioner, the Texas Cases have consistently maintained that the City cannot be estopped by unauthorized acts of its officers. Where, as here, a mandatory non-waiver provision exists and no waiver has been made by a City Council Resolution, city employees have no authority

to waive the notice provision and no authority to effect an estoppel. *Phillips v. City of Abilene,* supra; *City of Houston v. Hruska,* supra; *Barrett v. City of Dallas,* supra.

For the proposition that the City may be estopped, the Petitioner quotes from *Phillips v. City of Abilene,* at page 11 of his brief. The *Phillips* quotation taken in context, shows that it does not represent any authority for the proposition that the City could be estopped from asserting non-compliance with the notice provision in the case at bar. The quotation in context reads as follows:

> "We believe that under some facts and circumstances the City may be estopped from pleading the ordinance requiring written notice. It was so held in the case of *Cawthorn v. City of Houston,* Tex. Com. App., 231 S.W. 701. *But that case is distinguishable from the case at bar upon the facts. In the Cawthorn case there was no ordinance prohibiting the City Commission from waiving a compliance with the ordinance requiring written notice.*" (Emphasis added)

II.

Section 1, Chapter XXVIII and Section 6, Chapter XXVIII of the Charter of the City of Dallas Are Not Violative of the United States Constitutional Guarantees of Equal Protection and Due Process of Law Under the Fourteennth Amendment and the Right to a Fair Trial by Jury Under the Seventh Amendment, and the Cases Relied on by Petitioner Are Distinguishable From the Case at Bar.

As a general rule statutes requiring that a notice, demand or claim shall be given, made or presented, and

also similar charter provisions adopted by municipalities pursuant to due authorization, are mandatory and create conditions precedent, and a failure to comply with such a provision defeats recovery. 64 *Corpus Juris Secundum* Sec. 2199. Notice of claim provisions are found in most states and they are consistently upheld as valid and constitutional. 18 *McQuillan on Municipal Corporations* (3rd Edition Revised) Sec. 53.152, 53.154. The above cited sections from *McQuillan* list more than twenty-five states which uphold notice of claim provisions. Many jurisdictions have upheld the validity and constitutionality of notice of claim provisions within the past few years. *England v. City of Richmond,* 419 F. 2d 1156 (7th Cir. 1969), *Bituminous Cas. Corp. v. City of Evansville, Indiana,* 191 F. 2d 572 (7th Cir. 1951), *Kilaru v. Watts,* 339 F. Supp. 1362 (E.D. Wisconsin, 1972), *Fisher Contracting Company v. Housing Authority of the City of Plymouth,* 329 F. Supp. 1028 (E.D. Wisconsin, 1971), *Jewell Ridge Coal Corp. v. City of Charlotte, North Carolina,* 204 F. Supp. 256 (W.D. North Carolina, 1962), *Repaskey v. Chicago Transit Authority,* 293 N.E. 2d 440 (Appellate Court of Illinois, 1973), *City of Louisville v. O'Neill,* 440 S.W. 2d 265 (Court of Appeals of Kentucky, 1969), *Floyd v. City of Butte,* 412 P. 2d 823 (Supreme Court of Montana, 1966), *Maier v. City of Ketchikan,* 403 P. 2d 34 (Supreme Court of Alaska, 1965).

Sections 1 and 6 of CHAPTER XXVIII of the Charter of the City of Dallas, having uniform application to all

claimants, *sui juris,* against the City of Dallas, do not violate the constitutional guarantee of equal protection of the laws. Nor do those sections violate the due process guarantee. Petitioner was afforded a means, through statute, by which to pursue his claim against the City.

The Charter provisions are not violative of the constitutional guarantee of the right to trial by jury. The trial court, the Court of Civil Appeals, and the Supreme Court of Texas found that no genuine issue as to any material fact existed in the instant case. Unless a fact issue exists in a case there is no right to a trial by jury.

* * *

Petitioner cites two cases decided by Michigan courts in support of his contention that the City of Dallas notice provision is unconstitutional. The Supreme Court of Michigan, in *Reich v. State Highway Department,* 194 N.W. 2d 700 (Mich. 1972), held that the sixty-day notice provision of the State Tort Claims act violated the equal protection guarantee of the state and federal constitutions. The court reached this decision by reasoning that when the legislature passed the Tort Claims Act waiving governmental immunity, it *intended* to put governmental tort-feasors on an equal footing with private tort-feasors. Since the legislature's *intention* was to place victims of negligent conduct on equal footing, the court reasoned that the sixty-day notice requirement would act to bar the actions of governmental negligence after sixty days

but the victims of private negligence would have three years in which to bring their actions.

The reasoning of the *Reich* case is not applicable to the case at bar. The instant case involves street maintenance, which is a proprietary function of the city. Our state legislature has expressed no intention, through any nature of legislation concerning proprietary functions such as this, to "place victims of negligent conduct on equal footing" as in *Reich*. Cities have never been protected by the Doctrine of Governmental Immunity in connection with suits arising out of proprietary functions. Cities have always been subject to liability arising out of their own negligence as well as the negligence of their employees when involved in proprietary functions, yet claimants still have been required to comply with notice provisions as a condition precedent to the bringing of suit.

Moreover, the Texas Legislature has expressed no intention to place victims of negligent conduct on equal footing as far as giving notice of claim is concerned. Article 6252-19, Tex. Rev. Civ. Stat. Ann., known as the Texas Tort Claims Act, provides for waiver of governmental immunity under certain enumerated, but not all, circumstances and places a limit on the amounts recoverable under the Act. The Act provides for a notice of claim (within six months from the date of the incident) to be given to the applicable governmental unit and, in Sec. 16, expressly ratifies and approves existing provisions of cities requiring notice within a specified period

of time. In addition, the act specifically excludes any application of its terms to proprietary functions of a municipality. This exclusion indicates that the intention of the Texas Legislature, rather than to effect any change in the law concerning proprietary functions, is to maintain the present status of tort law applicable to suits involving proprietary functions. This, of necessity, would include the intention to continue to uphold and approve City Charter provisions requiring notice of claim.

It should be noted here that the City of Dallas Charter provision in question was recently amended to provide for a notice of claim within six months of the incident complained of. This change became effective June 19, 1973, and the thirty-day provision in issue here is no longer applicable.

Petitioner argues that the City's notice provision constitutes a statute of limitations. The case of *Cooper v. Westchester County*, 39 F. Supp. 58 (S.D. N.Y. 1941) discussed the constitutionality of a notice provision similar to that of the City of Dallas and met the argument that the provision constituted a statute of limitations, at page 61:

> "A provision requiring the filing of notice of claim and the service of notice of intention to sue is not to be regarded as a short statute of limitations. All conditions imposed by the legislature upon the qualified right to sue are essential prerequisites. [Citing cases] The statute is not arbitrary but provides a check demanded by public necessity against unscrupulous raids

> upon the public purse by means of fraudulent claims. . . . There is no deprivation of property without due process as Plaintiff is afforded an opportunity, though restricted, to obtain compensation for claimed wrongs. The statute is 'rooted in public needs' and is valid exercise of the power of the State.

Compliance with the notice provision is merely a condition precedent to the bringing of suit against the City; and the Plaintiff in a personal injury action against the city, as well as in suit against private individuals, still has two years in which to bring suit. Furthermore, any failure by the Plaintiff to comply with the notice provision has no affect on his right to sue any city employees against whom he may have a cause of action. The city's notice provision, as well as statutes of limitations, are statutory in nature and constitute legislative determinations. Petitioner's theory could be carried to the point of arguing that various periods of limitations divide potential persons into classes, and that the court should throw out all differentials in statutes of limitations. This would result in judicial determination of statutes of limitations, where it is the legislature which possesses the authority to make or change such laws.

Petitioner next discusses the case of *Galbreath v. City of Indianapolis*, 255 N.E. 2d 225 (Ind. 1970) to support his contentions that the City of Dallas notice provision is unconstitutional and that the city should be estopped to assert non-compliance therewith. That case involved a City of Indianapolis notice provision which contained

no mandatory non-waiver provision. No constitutional challenge to the notice provision was asserted. The Indiana court based its decision on the doctrine of substantial compliance. The Texas courts have affirmatively rejected adoption of the substantial compliance doctrine with regard to notice provisions. *Phillips v. City of Abilene,* supra.

Stone v. District of Columbia, 237 Fed. 2d 28 (D.C. Cir. 1956, Cert. Den. 77 S.Ct. 221), cited by Petitioner at page 16, was decided on the basis of statutory construction. The court held that Section 1-301 of the D.C. code (which provided that the corporation council would have charge and conduct of all law business of the district and of all suits instituted by and against the government thereof) made notice to the corporation council, if otherwise adequate, equivalent to the notice to the commissioners under Section 12-208.

In *Rabinowitz v. Town of Bay Harbor Islands,* 178 So. 2d 9 (Florida 1965), also cited at page 16, the Supreme Court of Florida held that where the agents and employees of the town had the authority to waive the notice provision, that the town could be estopped by their actions and representations. The town's charter did not contain a mandatory non-waiver provision.

Petitioner, at page 18 of his brief, quotes the following from *City of Terrell v. Howard,* supra:

> ". . . The effect of the amendment viewed in its entirety is clearly to violate plaintiff's constitutional guarantee that 'all courts shall be open, and every

> person for an injury done him, in his . . . person . . . shall have remedy by due process of law.' Const. Tex. Art. 1, Section 13.

"The amendment" referred to in the foregoing quotation was a City of Terrell ordinance providing that "no suit for damages for any injury to any person or property shall be brought against the City of Terrell without first obtaining the consent of the Commissioners, or a majority thereof, at a regular meeting to bring said suit." The court went on to uphold the City's thirty-day notice provision as a condition precedent to the bringing of suit against the city.

CONCLUSION

The Courts of Texas, as well as other jurisdictions, have consistently upheld the validity of Municipal Charter provisions requiring notice of claim to a specified city officer within a specified period of time after injury or damage has occurred. They have also upheld the validity of the mandatory non-waiver provision. Petitioner has cited no applicable opinions which support his position.

The trial court properly granted Respondent's Motion for Summary Judgment on the basis that there was no genuine issue as to any material fact, Petitioner having failed to comply with CHAPTER XXVIII, Section 1 of the Charter of the City of Dallas, a condition precedent to the filing of his suit herein. The Court of Civil Appeals

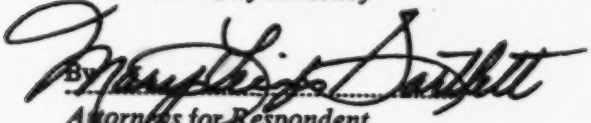
properly affirmed that judgment and the Supreme Court was correct in finding "No Reversible Error."

WHEREFORE, Respondent City of Dallas prays that this Honorable Court in all things deny Petitioner's Writ of Certiorari.

Respectfully submitted,

N. ALEX BICKLEY,
City Attorney of the City of Dallas

MARY LEIGH BARTLETT,
Assistant City Attorney

By 
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CERTIFICATE OF SERVICE

I, Mary Leigh Bartlett, Attorney for the City of Dallas, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 14 day of February, 1974, I served three (3) true and correct copies of the foregoing Brief of the Respondent in Opposition to Petition for Writ of Certiorari to Mark Delk, Attorney for Petitioner, 4314 Republic National Bank Tower, Dallas, Texas 75201, by depositing same in the United States Mail, postage prepaid.

Mary Leigh Bartlett